IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

Khem Chand @ Khemesh & Another Vs. State of Rajasthan
(D.B. Criminal Appeal No.362/2003)

D. B. Criminal Appeal under Sec.374 (2) Cr.P.C. against the judgment dated 15-2-2003 in Sessions Case No.51/1997 passed by Shri Rajendra Kumar Sharma-I, RHJS, Additional Sessions Judge No.1 Bayana (Bharapur).

Date of Judgment: August 03, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE GUMAN SINGH

Mr. Suresh Pareek] for the appellants.
Mr. N.A. Naqvi]
Mr. N.C.Sharma]

Mr. M.L.Goyal, Public Prosecutor for the State.

Mr. Suresh Sahni] for the complainant.
Mr. R.M.Sharma]

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

Khem Chand @ Khemesh and Prem Shankar, appellants herein along with two other co-accused, were put to trial before learned Additional Sessions Judge No.1 Bayana (Bharatpur), who vide judgment dated February 15, 2003 while acquitting co-accused, convicted and sentenced the appellants as under:-

Khem Chand @ Khemesh:
U/s.302/34 IPC:
To suffer imprisonment for life and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for one month.

U/s.307 IPC:

To suffer rigorous imprisonment for ten years and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for one month.

U/s.341 IPC:

To suffer simple imprisonment for one month.

Prem Shankar:

U/s.302 IPC:

To suffer imprisonment for life and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for one month.

U/s.307/34 IPC:

To suffer rigorous imprisonment for ten years and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for one month.

U/s.341 IPC:

To suffer simple imprisonment for one month.

Substantive sentences were ordered to run concurrently.

2. The prosecution case as unfolded during trial is as under:-

On receiving written information from the Hospital about fire arm incident, Nasir Khan, Sub Inspector Police Station Bayana (Bharapur) rushed to the hospital and recorded parcha bayan of Thalesh Chand (Pw.2) on November 11, 1996 at 12.15 PM. Thalesh Chand stated that on the said day around 11.45 AM while he and his son Rajesh were proceeding to meet one Satya Prakash, they were belaboured near the well by Khemesh, Virma @ Prem Shankar, Gudda @ Akhlesh and one bearded boy. Prem Shankar then opened three fires from Katta on Rajesh, that hit on his chest. Khemesh opened fire with 12 bore Katta at him (Thalesh) and caused injury on his hip. Gudda who was armed with sword, left the sword and fled away. The assault was made because of old enmity. Pooran, Tekchand @ Pola and Laddu @

Mool Chand had seen the incident. Rajesh was removed to the hospital where he was declared dead. On that parcha bayan a case under section 302, 307, 341/34 IPC was registered and investigation commenced. Dead body was subjected to autopsy, necessary memos were drawn, statements of witnesses were recorded, accused were arrested and on completion of investigation charge sheet was filed. In due course the case came up for trial before the learned Additional Sessions Judge No.1, Bayana. Charges under sections 302, 302/34, 307, 307/34 and 341 IPC were framed against the appellants, who denied the charges and claimed trial. The prosecution in support of its case examined as may as 10 witnesses. In the explanation under Sec.313 CrPC, the appellants claimed innocence. Six witnesses in support of defence were examined. Learned trial Judge on hearing final submissions, while acquitting co-accused persons, convicted and sentenced the appellants as indicated herein above.

3. Death of Rajesh was undeniably homicidal in nature. As per Post Mortem Report (Ex.P-16) following ante mortem injuries were found on the dead body:-

> 1. Gunshot wound circular 3cm in diameter margins (wound of entry) inverted, irregular & blackened over the anterior chest wall on left side 5cm below at the nipple & 5cm lateral to mid line.
> 2. Gunshot wound explored 6 pieces (5 made of plentic line maternal & 1 metal piece) removed from the wounds, sealed, preserved & handed over to police for ballistic examination. On exploration costal cartilage Rib (7 & 8 rib) anterior chest wall fractured, Lt. side of wall ruptured, abdominal cavity is full of blood, stomach through & through ruptured.
> Metal piece formed nerve L1-2 vertebra, inferior vena cava & descending aorta is lacerated in abdominal cavity.

In the opinion of Dr. Ram Kumar Gupta (Pw.7) the cause of death was shock due to gunshot injury to liver, stomach and large vessels in abdomen.

4. Injuries sustained by Thalesh Chand (Pw.1) were examined and as per injury report (Ex.P-5) following injuries were found on his person:-

1. Gunshot wound 3cm x 2cm over gluetal region in lower & inner margin inverted quadrant
(wound of entry) two
2. wound of exit 3cm x 2cm on Rt. side & lateral margin

5. We have heard the submissions advanced before us and scrutinised the evidence adduced at the trial.

6. The witness Pooran Chand Sharma (Pw.8) and Mool Chand Sharma (Pw.9) named in the FIR did not support the prosecution case and they were declared hostile. The only eye witness, who deposed against the appellant is Thalesh Chand (Pw.2). In his deposition Thalesh Chand stated that all the four assailants were armed with Kattas and they surrounded Rajesh. When he (Thalesh) made attempt to intervene, Khemesh exhorted to kill him also. In the meanwhile Prem Shankar opened fire, that hit on the chest of Rajesh. He (Thalesh) then ran for his life but Khemesh followed him and opened fire at him that hit on his left hip. Testimony of Thalesh Chand was attacked from various angles by the learned counsel for the appellant. It was contended that Thalesh Chand was a history sheeter and involved in many criminal cases. Even Rajesh was also a dangerous criminal of that area. Learned counsel took us through the cross examination of Thalesh Chand and the evidence of defence witnesses. It is true that Thalesh and Rajesh were involved in few criminal cases but this fact itself cannot be

a ground to discard the testimony of Thalesh Chand. The testimony of a single witness can be sufficient to prove the guilt of the accused, if found entirely reliable. In case of the sole ocular witness, however the court should be on their tip toe and guard and must scrutinise the evidence with greater care and caution. Section 134 of the Indian Evidence Act provides that no particular number of witness shall in any case be required for the proof of any fact.

7. It was canvassed by the learned counsel for the appellants that in view of the contradictions in the statement of Thalesh Chand he could not be ranked as wholly reliable witness therefore his testimony ought to have been outrightly discarded. Learned counsel pointed out the embellishment made by the witness in his cross examination. Learned counsel placed reliance on State of UP v. Madan Mohan (AIR 1989 SC 1519), Satya Narayan V. State of Madhya Pradesh (AIR 1972 SC 1309), Narain Soni v. State of Rajasthan [1997 CrLR (Raj.) 164], Ramesh v. State of Rajasthan [1996(1) RLW (Raj.) 533], Babu Krishna Kamble v. State of Maharashtra (AIR 1989 SC 1269), Kachwa v. State of Rajasthan [1985 RLR 92] and Harish Chandra @ Pappu v. State of Rajasthan [1996 CrLR (Raj.) 177].

8. Having gone through the testimony of Thalesh Chand, we although find discrepancies, they however do not affect the core of the prosecution case. In Munshi Prasad v. State of Bihar (2002)1 SCC 351, the Hon'ble Supreme Court indicated that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its

entirety. If the general tenor of the evidence given by the witness and the trial court upon appreciation of evidence forms opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. In Anil Rai v. State of Bihar (2001)7 SCC 318, where the discrepancies in description by eye witnesses of guns and rifles in the hands of accused persons were not found material. It was held that there is hardly any difference between gun and rifle for a common man. In Sukhdev Yadav v. State of Bihar (2001)8 SCC 86, it was observed by the Apex Court that there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment.

9. In the case on hand we find some variations in the testimony of Thalesh Chand, but there exist no major contradictions on record. The evidence of the witness cannot be discarded in its entirety. In order to find out the truth from the evidence, the court can sift the chaff from the grain.

10. That takes us to the question as to whether the appellant Khem Chand can be held vicarious liable with the aid of section 34 IPC. Section 34 IPC recognises the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. A common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence.

Such preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

11. In Gopi Nath v. State of UP (2001)6 SCC 620, the Apex Court indicated that:-

> "Section 34 IPC lays down the rule of joint responsibility for criminal acts performed by plurality of persons who joined together in doing the criminal act, provided that such commission is in furtherance of the common intention of all of them. Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action – be it that it was not over or was only a covert act or merely an omission constituting an illegal omission. The section is, therefore, attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a pre-concerted or prearranged plan or one manifested or developed at the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inference deducible from the circumstances of each case."

12. In Suresh v. State of UP (2001)3 SCC 673, the Apex Court had

occasion to consider section 34 IPC and it was held thus:-

> "The dominant feature for attracting Section 34 IPC is the element of participation in absence resulting in the ultimate "criminal act". For appreciating the ambit and scope of S.34, the preceding Sections 32 and 33 have always to be kept in mind. Under S.32 acts include illegal omissions. Section 33 defines the "act" to mean as well a series of acts as a single act and the word "omission" denotes as well a series of omissions as a single omission. The "act" referred to in the later part of S.34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of S.34 shall be rendered infructuous. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under S.34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention."

13. Having closely gone through the testimony of Thalesh Chand, we find that appellant Khem Chand did not share common intention with Prem Shankar in the act of opening fire at Rajesh. It was the individual act of appellant Prem Shankar. Similarly, the appellant Khem Chand individually

chased Thalesh Chand and while Thalesh entered into a street Khem Chand opened fire at him that hit on left hip of Thalesh Chand. In our opinion, the testimony of Thalesh Chand is found consistent and creditworthy so far it relates to the charges under section 302 IPC against appellant Prem Shankar and under section 307 IPC against appellant Khem Chand.

14. For these reasons, we dispose of instant appeal in the following terms:-

(i) We dismiss the appeal of Prem Shankar and maintain his conviction and sentence under section 302 IPC. We however acquit him of the charges under section 307/34 and 341 IPC.

(ii) We partly allow the appeal of appellant Khem Chand @ Khemesh and acquit him of the charges under sections 302/34 and 341 IPC. We however maintain his conviction under section 307 IPC. Looking to the fact that the appellant has already undergone confinement for a period more than six years and five months, the ends of justice would be met in sentencing him to the period already undergone by him in confinement. Appellant Khem Chand @ Khemesh, who is in jail, shall be set at liberty forthwith, if he is not required to be detained in any other case.

(iii) The impugned judgment of learned trial court stands modified as indicated above.

(Guman Singh),J. (Shiv Kumar Sharma)J.

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